No. 89-1501

In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, ET AL.,
PETITIONER

v.

RICHARD B. CHENEY, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
STUART M. GERSON
Assistant Attorney General
LEONARD SCHAITMAN
THOMAS M. BONDY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether federal employees may obtain judicial review of a claim that a Department of Defense decision to contract out certain services to a private contractor is based on a cost comparison that is not in conformance with provisions of OMB Circular A-76 and that employs costs that are not "realistic and fair" within the meaning of Section 1223(b) of the National Defense Authorization Act for Fiscal Year 1987.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulation:

Statutes and regulation – Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1501

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, ET AL., PETITIONER

v.

RICHARD B. CHENEY, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the district court (Pet. App. 71) is unreported. The decision of the panel of the court of appeals (Pet. App. 1-61) is reported at 883 F.2d 1038. The order of the court of appeals denying the petition for rehearing (Pet. Supp. App. 1) is unreported. The order of the court of appeals denying the suggestion for rehearing en banc (Pet. App. 62-70) is reported at 892 F.2d 98.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1989. A petition for rehearing was denied on December 22, 1989 (Pet. Supp. App. 1). The petition for a writ of certiorari was filed on March 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Office of Management and Budget (OMB) Circular A-76 sets forth the government's policy regarding the contracting out of commercial functions to the private sector. Based on the recognition that "it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs" (Circular, para. 4.a), the Circular states that as a general principle commercial activities are to be contracted out to the private sector unless it would be more economical to perform the activity in-house. See *Department of the Treasury, IRS* v. *FLRA*, 110 S.Ct. 1623, 1625-1626 (1990).

The central directive of the Circular is that "the Government shall not start or carry on any activity to provide a commercial product or service if the product or service can be procured more economically from a commercial source." Circular, para. 5.c. Thus, the Circular instructs the heads of Executive Branch agencies that "[w]henever commercial sector performance of a Government operated commercial activity is permissible, * * * comparison of the cost of contracting and the cost of in-house performance shall be performed to determine who will do the work." *Id.*, para. 5.a. In general, "Government performance of a commercial activity is authorized [only] if a cost comparison * * * demonstrates that the Government is operating or can operate the activity on an ongoing basis at an estimated lower cost than a qualified commercial source." *Id.*, para. 8.d.

A supplement to the Circular provides guidance to agency management on how to conduct cost comparisons. With respect to any particular commercial activity, agency management officials are directed first to develop a performance work statement (PWS) that specifies the nature and mission of the activity. OMB Circular A-76, Supple-

plement at I-11; *id.*, Pt. II. The next step is to define the most efficient and effective organization (MEO) of government employees and resources that would be able to perform the activity. Supplement at I-12; see *id.*, Pt. III. A cost comparison handbook then provides guidelines on how to compute the cost of government performance pursuant to the MEO. Supplement, Pt. IV. Finally, the in-house cost is compared to the cost of private sector performance. The private sector cost is measured according to bids submitted by contractors, as adjusted to take into account conversion and various other costs. See Supplement at I-12.

The Circular requires each executive agency to establish an administrative appeal procedure, pursuant to which agency employees and their unions, as well as bidders on the solicitation at issue, may challenge an A-76 determination on the ground that the decision failed to adhere to the dictates of the cost comparison handbook. Circular, para. 6.g; Supplement at I-14. Appeals must be filed and decided quickly; a party has 15 working days from receipt of supporting documentation to file an appeal (Supplement at I-15), and "[t]he appeals procedure must * * * provide for a decision within 30 calendar days of receipt of the appeal." *Id.* at I-14. "The original appeal decision shall be final unless the agency procedures provide for further discretionary review within the agency." *Ibid.*

The Circular specifies that "[t]his Circular and its Supplement shall not * * * [e]stablish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular, except as specifically set forth in [the Circular's administrative appeals provisions]." Circular, para. 7.c.(8). And the provision governing administrative appeals explicitly states: "The [required administrative appeal] procedure does not authorize an appeal outside the agency or a judicial review." Supplement at I-14.

2. In 1980, pursuant to OMB Circular A-76, the Army decided to conduct a commercial activity review of the Directorate of Logistics at the Army's installation at Fort Sill, Oklahoma. Pet. App. 2. The Directorate of Logistics provides support, maintenance, transportation, and supply functions for Fort Sill. *Id.* at 3. The Army identified the Directorate's commercial functions and developed performance work statements for those functions. The Army then devised the most efficient configuration of government resources pursuant to which the functions could be performed, and according to that configuration computed the cost of performing the functions in-house. *Ibid.*

To determine whether the Directorate's commercial activities should be contracted out to the private sector, the Army solicited and received bids for the work specified in the performance work statements. The Army ultimately concluded that the work should be contracted to Northrup Worldwide Aircraft Services, Inc., which had bid 53.2 million dollars. Pet. App. 4. The in-house cost, as computed in the MEO, was estimated at 61.4 million dollars. *Ibid.*

Petitioner National Federation of Federal Employees (NFFE), a union representing employees whose jobs allegedly would be affected by the decision to contract out, submitted an administrative appeal to the Army challenging that decision. Essentially, the union contended that the Army had improperly relied on inflated in-house costs and at the same time had erroneously discounted various costs associated with contractor performance. Pet. App. 4-5. The Army's administrative review board rejected the union's challenge. *Id.* at 5. In a lengthy written decision, the review board found that although four of the union's 59 allegations had some merit, the union had not shown that the ultimate determination—that the cost of the contractor's performance would be less than the cost of in-house performance—was incorrect.

3. NFFE and one of its locals, also a petitioner here, filed this action in district court, seeking injunctive and declaratory relief. Petitioners alleged that the Army's cost comparison was not in conformance with the directives set forth in A-76's cost comparison handbook. Petitioners also alleged that the costs used were not "realistic and fair" within the meaning of Section 1223 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3977.[1]

The district court granted the government's motion to dismiss. Pet. App. 71. In a ruling from the bench, the court reasoned that judicial review was unavailable, because agency compliance with the cost comparison provisions of OMB Circular A-76 is "committed to unreviewable agency discretion" (Pet. App. 73), and because the "realistic and fair" clause in Section 1223(b) does not provide "ascertainable standards or any law to apply." Pet. App. 73. In the alternative, the district court ruled that petitioners lacked standing. The court explained that "[a]lthough there is injury in fact, the [petitioners] are not within the zone of interest and do not meet the zone of interest test." *Id.* at 73-74.

4. A divided panel of the court of appeals, agreeing with the district court's conclusion that petitioners lacked standing, affirmed the judgment of the district court. The court of appeals held that, because they failed to meet the requirements of the "prudential zone of interest test," petitioners lacked standing under the Administrative Procedure Act, 5 U.S.C. 702; the court therefore did not ad-

---

[1] The complete text of Section 1223 of the National Defense Authorization Act For Fiscal Year 1987 appears at Pet. App. 75-76. Section 1223 was originally codified at 10 U.S.C. 2304 note. In 1988, the provision was repealed and recodified at 10 U.S.C. 2462. See Act of July 19, 1988, Pub. L. No. 100-370, §§ 2(a)(1) and 2(c)(3), 102 Stat. 851, 854.

dress the question whether petitioners had standing under Article III of the Constitution. Pet. App. 7-8 n.8.

The court of appeals began its analysis by quoting this Court's observation that prudential standing requires that the "plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute * * * in question'." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-475 (1982) (quoting *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970)). Pet. App. 8. Referring to the decision in *Clarke* v. *Securities Industry Association*, 479 U.S. 388 (1987), which it described as "the most recent and leading Supreme Court statement on the zone of interest test" (Pet. App. 9), the court of appeals reiterated this Court's statement that "the test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." Pet. App. 10 (quoting *Clarke*, 479 U.S. at 399-400).

The court recognized that, at bottom, the prudential standing inquiry turns on congressional intent (see *Clarke*, 479 U.S. at 394): the zone of interest test "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the [relevant] statute that it cannot reasonably be assumed that Congress intended to permit suit." Pet. App. 10 (quoting *Clarke*, 479 U.S. at 399). Thus, showing that a plaintiff is within the zone of interest of a statute "requires less than a showing of congressional intent to benefit but more than a 'marginal[ ] rela[tionship]' to the statutory purposes." Pet. App. 24.

Applying these principles, the court found that neither of the two statutes cited by OMB Circular A-76 as authority for its promulgation—the Budget and Accounting Act of 1921, 31 U.S.C. 501 *et seq.*, and the Office of Federal

Procurement Policy Act Amendments of 1979, 41 U.S.C. 401 *et seq.* (the OFPPAA)—permits a reasonable inference that federal employees or their unions should be allowed to seek judicial review of a cost comparison performed under the Circular.[2]

Turning first to the Budget and Accounting Act of 1921, the court noted that the main effect of that statute was to create two government agencies, the General Accounting Office (GAO) and the Bureau of the Budget, OMB's predecessor agency. Pet. App. 16-17.[3] The purpose of these agencies was "to increase efficiency in government operations" and to "centralize the budgeting system under a single office in each of the two political branches." *Id.* at 16. The GAO was to participate in the budget process as representative of the Legislative Branch, and the Bureau of the Budget was to oversee the formulation of the budget within the Executive Branch. Noting that "[n]othing in the legislative history of the 1921 Act [as amended] suggests that Congress contemplated the protection of employment of federal employees" (*id.* at 20), the court concluded that petitioners' interest in preserving government jobs did not fall within the zone of interests protected by the statute.

The court reached the same conclusion with respect to the OFPPAA. Pet. App. 26-29. As the court noted (*id.* at 26), in 1974 Congress enacted the Office of Federal Pro-

---

[2] Paragraph 3 of OMB Circular A-76 provides:

> *Authority.* The Budget and Accounting Act of 1921 (31 U.S.C. 1 *et seq.*), and The Office of Federal Procurement Policy Act Amendments of 1979 (41 U.S.C. 401 *et seq.*).

The court of appeals seems to have assumed that petitioners asserted standing under both of these statutes. See Pet. App. 9. But as petitioners point out (Pet. 18 n.5), they did not assert standing under the Budget and Accounting Act of 1921.

[3] Various Bureau of the Budget functions were transferred to OMB under Reorganization Plan No. 2 of 1970, see 31 U.S.C. 501 note.

curement Policy Act, Pub. L. No. 93-400, 88 Stat. 796, a central feature of which was to create within OMB an Office of Federal Procurement Policy charged with providing executive agencies with overall direction on matters of procurement policy. See 41 U.S.C. 402(b), 404(a). The OFPPAA, enacted in 1979, amended the Office of Federal Procurement Policy Act in certain respects, and extended the life of the Office of Federal Procurement Policy. Office of Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83, 93 Stat. 648.

The court stated that, "[a]fter a thorough review of the OFPPAA and its legislative history, we have found nothing to suggest a congressional purpose more than marginally related to the interests of federal employees vis-a-vis procurement policy." Pet. App. 26. Citing and quoting congressional committee reports,[4] the court observed that enactment of the OFPPAA reflected Congress's explicit endorsement of the contracting-out policy set forth in OMB Circular A-76. Pet. App. 26-28. The court concluded that since federal employees' "real interest of job protection flies in the face of a policy that federal departments and agencies, through OMB Circular A-76, should rely on the private sector" (Pet. App. 28-29), the OFPPAA does not provide a basis for inferring that unions or employees should be able to bring suit in district court to challenge a cost comparison conducted under the Circular.

Next, the court held that petitioners lacked standing to argue that the Army's cost figures were not "realistic and fair" within the meaning of Section 1223 of the National Defense Authorization Act for Fiscal Year 1987. Pet. App. 29-34. The court noted that Section 1223 is essentially a mandatory contracting-out provision, commanding that a commercial function "shall" be contracted out if

---

[4] *E.g.*, S. Rep. No. 144, 96th Cong., 1st Sess. (1979).

in-house performance would not be economical, unless under the circumstances contracting out is prohibited by law or the Secretary of Defense determines that the activity in question must be performed by governmental or military personnel. See Pet. App. 64. Moreover, the court observed, the legislative history shows that the "realistic and fair" requirement was intended to rectify a bias against private contractors in the existing cost comparison process. *Id.* at 30-31 (citing S. Rep. No. 331, 99th Cong., 2d Sess. (1986)). "It follows," the court concluded, "that appellants' interests [in maintaining in-house performance] are not within the zone of interests of the Authorization Act of 1987." Pet. App. 31-32.[5]

Judge Mikva dissented. In his view, the zone of interest issue turned on the question whether "the plaintiff is a peculiarly suitable challenger of administrative neglect." Pet. App. 48 (quoting *Hazardous Waste Treatment Council* v. *EPA*, 861 F.2d 277, 283 (D.C. Cir. 1988) (per curiam), cert. denied, 109 S. Ct. 3157 (1989)). He concluded that petitioners satisfied that test because he believed that federal employees would likely be the only plaintiffs who could challenge mistaken decisions to contract out.[6] Pet. App. 48-50. In the absence of a statute indicating "a congressional intent to preclude reliance on this particular class of plaintiffs" (*id.* at 50), Judge Mikva found no basis

---

[5] In addition to denying standing under the Budget and Accounting Act of 1921, the OFPPAA, and the 1987 DoD Act, the court of appeals also held that petitioners did not qualify under the doctrine of disappointed bidder standing discussed in *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). Pet. App. 34-39. Petitioners do not take issue with this aspect of the court's decision.

[6] In contrast, the majority said that, since the parties had not addressed the question, "we are unable to hold with any degree of confidence that no such plaintiff lurks in the background." Pet. App. 32 n.26.

for inferring that Congress would not have wanted federal employees or their unions to obtain judicial review of contracting out decisions, as in this case. *Id.* at 39-61.[7]

5. The court of appeals denied petitioners' petition for rehearing with suggestion for rehearing en banc. Pet. App. 62-66. Judge D.H. Ginsburg, joined by Judges Silberman, Williams and Sentelle, filed a statement concurring in the denial of rehearing en banc (*id.* at 63),[8] and Judge

---

[7] Relying in part on the D.C. Circuit's decision in *Department of the Treasury, IRS* v. *FLRA*, 862 F.2d 880 (1988), Judge Mikva also stated that, in his view, the district court erred in holding that the agency action at issue in this case is not subject to judicial review. Pet. App. 60. In *Department of Treasury, IRS* v. *FLRA*, the court of appeals had upheld the Federal Labor Relations Authority's determination that a union's complaint alleging that an agency contracting-out decision was in violation of OMB Circular A-76 is subject to the grievance and arbitration machinery of the federal labor relations statute. *Department of Treasury, IRS* v. *FLRA* has since been reversed by this Court. *Department of the Treasury, IRS* v. *FLRA*, 110 S. Ct. 1623 (1990).

[8] In his statement, Judge Ginsburg explained why, in his view, the panel decision was not in tension with the decision of another panel of the D.C. Circuit in *CC Distributors, Inc.* v. *United States*, 883 F.2d 146 (1989). In *CC Distributors*, contractors had challenged the decision of the Air Force to perform a function in-house on the ground that the Air Force had not conducted any cost comparison at all. The contractors relied, *inter alia*, on the requirement of Section 1223 of the National Defense Authorization Act for Fiscal Year 1987 that the Secretary of Defense "shall procure" those supplies or services not necessary for inherently governmental functions from private contractors if such contractors could provide the service or supply at lower cost than could the government. *CC Distributors*, 883 F.2d at 152. The court of appeals held (1) that the requirements for constitutional standing were satisfied (*id.* at 149-151); (2) that the contractors had prudential standing under Section 1223 to challenge the Air Force's determination to convert to in-house performance without conducting a cost comparison (883 F.2d at 151-153); and (3) that,

Mikva, joined by Judges Wald and Edwards, filed a dissent. *Id.* at 66-70.

ARGUMENT

The decision of the court of appeals is correct, and its result is in full accord with the decision of every other court that has considered whether federal employees—relying on a variety of grounds—may bring suit for judicial review of the cost comparisons underlying decisions to contract out. Two separate, but closely related, grounds support the court's result. First, the decision of a federal agency to contract out a function previously performed in-house is committed to the discretion of the Executive Branch, and is therefore not subject to judicial review. Although this ground was not reached by the court of appeals (see Pet. App. 39),[9] it is the underlying question in the case; only if some judicial review were appropriate would petitioners' claim to standing become an issue. Indeed, the issue of reviewability may be viewed as raising the question whether *anyone* has standing to mount a judicial challenge to a particular decision. Second, even assuming that judicial review of decisions to contract out may be appropriate in some circumstances, the court of appeals correctly held that federal employees and their unions do not have standing to seek review of the cost comparisons underlying a particular decision to contract out.

1. An agency evaluation of the relative costs involved in performing a given function in-house or contracting out

---

although Section 1223 provided "no law to apply," Department of Defense regulations provided standards to guide review of the Air Force's determination that the function at issue was an inherently governmental function (883 F.2d at 153-156).

[9] This ground was relied on by the district court (Pet. App. 73) and discussed by Judge Mikva in his dissent (see note 7, *supra*).

that function is not subject to judicial review because there is no legally enforceable requirement that governs the validity of the agency's evaluation. The evaluation of costs, and the consequent decision concerning whether to contract out, is governed by internal executive branch policy—as stated in Circular A-76—and by executive decisions.[10] In particular, because Circular A-76 is simply an internal management directive articulating the President's policy concerning contracting out, it is not itself a source of "law to apply." Cf. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). And since the other sources of "law to apply' that petitioners invoke similarly fail to provide "judicially manageable standards * * * for

---

[10] Legislation concerning contracting out is presently pending before Congress. H.R. 4015, 101st Cong., 2d Sess. (1990) ("Commercial Activities Contracting Procedures Act of 1990"). To the extent that this bill, if enacted, would alter the legal landscape bearing upon the issues presented in this case, the pendency of the legislation before Congress gives added force to our position that further review of the court of appeals' decision is not warranted.

The bill seeks to "[e]stablish uniform standards for Federal agency determinations of the most economical and efficient method for acquiring performance of commercial services" (§ 2(1)), and to "[e]nsure fair competitions for contracts for the procurement of commercial activities and meaningful opportunities for individuals, organizations, and commercial sources affected by those procurements to participate fairly in the process" (§ 2(3)). Among other things, the bill would require the Federal Acquisition Regulatory Council (see 41 U.S.C. 421) to amend the Federal Acquisition Regulation to establish detailed requirements for conducting cost comparison analyses. § 7(b). The bill would require each executive agency to establish a review board, one of whose functions would be to review the adequacy of cost comparison analyses. §§ 7(c), 9. Interested parties, including agency employees and their unions, would be entitled to seek review by this board, and also to appeal board decisions to the head of the agency. § 7(c)(3). Employees and their unions would also have the right to examine and comment upon the agency's performance work statements, and to appeal a decision not to take their comments into account. § 8(c).

judging how and when an agency should exercise its discretion," *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985), the cost comparison challenged by petitioners is "committed to agency discretion by law," 5 U.S.C. 701(a)(2), and not subject to judicial review.

a. Neither Circular A-76 itself, nor the statutes creating OMB and its component, the Office of Federal Procurement Policy (OFPP), impose legally binding obligations on federal agencies with regard to cost comparisons that were intended to be—or are—enforceable by the courts. The Budget and Accounting Act of 1921, as amended, creates OMB as "an office in the Executive Office of the President." 31 U.S.C. 501. OMB serves as "the President's principal arm for the exercise of his managerial functions." Reorganization Plan No. 2 of 1970, see 31 U.S.C. 501 note. "In carrying out its responsibilities, [OMB] issues policy guidelines to Federal agencies to promote efficiency and uniformity in Government activities. These guidelines are normally in the form of circulars." 5 C.F.R. 1310.1.

OMB Circular A-76 is such a policy guideline. By its terms, its purpose is to "establish[ ] Federal policy regarding the performance of commercial activities." Circular, para. 1 ("*Purpose.*"). Thus, the Circular is an internal policy directive from the President to guide agency officials in deciding whether certain services can be contracted out. As the *en banc* Fourth Circuit recently concluded:

> A Presidential order may have the force and effect of law when it is issued pursuant to statutory mandate or a delegation from Congress of lawmaking authority * * *, but Circular A-76 was issued pursuant to no such authority. It was issued pursuant to the executive branch's budget and management authority, by the Office of Management and Budget, "the President's principal arm for the exercise of his managerial functions."

United States Dep't of HHS v. *FLRA*, 844 F.2d 1087, 1096 (1988) (quoting Reorganization Plan No. 2 of 1970).

The conclusion that Circular A-76 does not itself create any legally enforceable obligations is supported by its own terms, which state that it "shall not * * * [e]stablish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular." Para. 7.c.(8).[11] The Circular is, in essence, the method the President has utilized to provide agency management officials with guidance on how they should exercise their authority to make contracting-out determinations. As such, it has precisely the same status as would an oral directive issued, in a simpler day, by the President to his agency heads. Rather than imposing an enforceable legal obligation, it is binding only in the same sense that any managerial directive is binding on subordinate officials; compliance with the directive is satisfactory only if and to the extent that the ultimate source of authority—in this case, the President—says it is.

b. To be sure, the Circular cites as "Authority" the Budget and Accounting Act of 1921 and the OFPPAA. Circular, para. 3. As noted above, the Budget and Accounting Act constitutes OMB as an agency within the Executive Branch charged with assisting the President in executing his managerial functions. Although Congress no doubt intended that OMB should advance the goal, *inter*

[11] The fact that Circular A-76 permits federal employees to participate in an internal appeals process relating to a decision to contract out does not alter this conclusion. The appeal procedures are internal to the agency and its expert personnel; they serve the agency's purposes by assuring it that it has had access to all possibly relevant information before making a decision to contract out. The procedures explicitly preclude "appeal outside the agency or a judicial review" (OMB Circular No. A-76, Supplement at I-14). Thus, the existence of these procedures does not suggest that the Circular's guidelines are intended to impose legally enforceable standards on agencies conducting cost comparisons.

alia, of "procurement efficiency" (Pet. 18 n.5), nothing in the statute charges OMB with advancing this goal only by imposing legally enforceable regulations on executive branch agencies. To the contrary, OMB might well conclude, consistent with its statutory charter, that the costs and delays attendant on judicial enforceability would, on balance, *retard* the goal of procurement efficiency. Therefore, the Budget and Accounting Act, which plainly does not itself provide "law to apply" to govern agency contracting out decisions, also does not render Circular A-76 a source of judicially enforceable legal obligations.

Nor does the OFPPAA provide "law to apply" to petitioners' claim. Although that Act does "establish [the OFPP] in the Office of Management and Budget to provide overall direction of procurement policies, regulations, procedures, and forms for executive agencies," 41 U.S.C. 402(b), it does not mention the issue of contracting out, and includes no legal standard to govern agency cost comparisons. Nor does it limit OFPP to accomplishing its task by promulgating legally binding, judicially enforceable regulations. In short, the fact that Congress has enacted statutes creating OMB and the OFPP and entrusted those agencies with the task of assisting the President does not mean that *every* detailed statement of Executive Branch policy issued by OMB and OFPP in the form of a Circular is a congressionally authorized regulation compliance with which is to be enforced in the district courts. Cf. *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F.2d 451, 456-457 (D.C. Cir. 1965), cert. denied, 382 U.S. 978 (1966).

c. Similarly, reviewability is not afforded by Section 1223 of the National Defense Authorization Act for Fiscal Year 1987. Section 1223 provides that the DoD must procure services or supplies from a source in the private sector "if such a source can provide such supply or service to the Department at a cost that is lower * * * than the cost at

which the Department can supply the same supply or service." 10 U.S.C. 2462(a). It also provides that the cost comparison must be "realistic and fair." 10 U.S.C. 2462(b). Even if these provisions, read together, could be said to address a DoD decision *in favor of* contracting out, neither of them creates a judicially manageable standard to govern petitioners' complaint.[12]

It is undisputed that a cost comparison was performed in this case; the gravamen of petitioners' complaint is precisely that such a comparison was done, albeit incorrectly. Section 1223 therefore supports petitioners' complaint, if at all, only if the terms "realistic and fair" provide, in this context, a judicially manageable standard. We submit that they do not. Whatever may be the case when broad terms comparable to "realistic and fair" are used in a statute granting a regulatory agency authority over private conduct,[13] the statute involved here – Section 1223 – grants no such regulatory power to any executive branch agency. Cf. note 10, *supra* (discussing pending legislative proposal). The statute concerns not the regulation of any private conduct, but rather, as noted above, the internal management of the federal government.[14]

---

[12] Section 1223 was repealed in 1988, and recodified at 10 U.S.C. 2462. The recodification was not intended to have any substantive effect. H.R. Rep. No. 696, 100th Cong., 2d Sess. 1 (1988); see also *id.* at 9.

[13] *E.g.*, 15 U.S.C. 78j (SEC rulemaking "as necessary or appropriate in the public interest or for the protection of investors"); 16 U.S.C. 824d(a) (FERC rules and regulations affecting or pertaining to rates "shall be just and reasonable").

[14] The fact that this case involves functions related to national security considerations suggests that close judicial review of the decision to contract out here is particularly inappropriate. Cf. *CC Distributors, Inc. v. United States*, 883 F.2d 146, 151-153 (D.C. Cir. 1989).

d. Over the years, federal employees and their unions have attempted to mount a wide variety of judicial challenges to agency cost estimates made pursuant to the evolving Circular A-76 policy guidelines. Every court to decide the issue has determined that the validity of those estimates is not judicially reviewable.[15] These courts have recognized that the "managerial decision and the studies and evaluations" that underlie the decision to contract out "involve[ ] 'questions of judgment requiring close analysis and nice choices.' " *Local 2855, AFGE* v. *United States*, 602 F.2d 574, 580-581 (3d Cir. 1979) (quoting *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958)). Because the ultimate decision "is necessarily a matter of judgment and managerial discretion," it is unsuitable for judicial review. *Local 2855*, 602 F.2d at 583.[16] Nothing in any statute cited by petitioners casts doubt on the results

---

[15] See, *e.g.*, *American Fed'n of Gov't Employees* v. *Brown*, 680 F.2d 722 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); *Local 2855, AFGE* v. *United States*, 602 F.2d 574, 577-583 (3d Cir. 1979); *American Fed'n of Gov't Employees, Local 1841* v. *United States Dep't of Defense*, 682 F. Supp. 479 (D. Nev. 1988); *National Maritime Union* v. *Commander, Military Sealift Command*, 632 F. Supp. 409, 417 (D.D.C. 1986) (Circular A-76 "provides no judicially enforceable substantive rights"), aff'd on other grounds, 824 F.2d 1228 (D.C. Cir. 1987); *American Fed'n of Gov't Employees* v. *Stetson*, 86 Lab. Cas. (CCH) ¶ 33,819, at 48,852 (D.D.C. July 24, 1979); *American Fed'n of Gov't Employees* v. *Hoffman*, 427 F. Supp. 1048, 1079-1082 (N.D. Ala. 1976). See also *United States Dep't of HHS* v. *FLRA*, 844 F.2d at 1096 ("The current version of the Circular * * * provide[s] no basis for third party review.").

[16] Cf. *United States Dep't of HHS* v. *FLRA*, 844 F.2d at 1092 ("Reliance on agency judgment is a recurring theme of the Circular and its accompanying Supplement."); *Defense Language Institute* v. *FLRA*, 767 F.2d 1398, 1401 (9th Cir. 1985) (holding that decision to contract out is managerial decision and not subject to collective bargaining), cert. dismissed, 476 U.S. 1110 (1976).

or reasoning of this consistent line of cases. In light of the unanimity in the lower courts, further review of this issue is unwarranted.

2. The standing issue in this case is closely tied to the reviewability issue; the question whether Congress intended a government agency's detailed cost comparisons to be subject to judicial review at all is only slightly distinct from the question whether Congress intended such comparisons to be judicially reviewed at the behest of a federal employee or his representative. The result reached by the court of appeals with respect to this issue is correct and does not conflict with the decision of any other court.

a. Petitioners make little if any effort to show that either the Budget and Accounting Act or the OFPPAA provides a plausible basis for permitting federal employees or their unions to seek judicial review of A-76 cost comparisons. Instead, petitioners lead off their discussion with an argument based on 10 U.S.C. 2467(b).[17] Pet. 20-22; see also Pet. 9-11 (also discussing Section 2467(b)). Petitioners' reliance on this provision is misplaced for two reasons. First, they did not rely on the provision in the court below, and for that reason the decision of the court of appeals

[17] Section 2467(b)—which was enacted in 1988 as part of the National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 331, 102 Stat. 1957—states in pertinent part that "[e]ach officer or employee of the Department of Defense responsible for determining under Office of Management and Budget Circular A-76 whether to convert to contractor performance any commercial activity of the Department * * * shall * * * during the development and preparation of the performance work statement and the management efficiency study used in making that determination, consult with civilian employees who will be affected by that determination and consider the views of such employees on the development and preparation of that statement and that study * * *."

does not refer to it.[18] There is no merit to the suggestion that this Court should grant certiorari in order to consider an argument that petitioners did not advance below, and that neither the court below nor any other court has addressed.

Second, petitioners' contention is wrong on its merits. One cannot reasonably conclude that, by requiring DoD to consult with employees during development of the PWS and MEO, Congress signaled an intent to provide employees and their unions with a right to judicial review of the ultimate cost comparison decision. Section 2467(b) does refer to OMB Circular A-76, but a central element of the Circular is its provision specifying that it is not intended to create any substantive or procedural basis for judicial review. Circular, para. 7.c.(8); Supplement at I-14. Thus by simply referring to the Circular, Congress cannot have meant to override the clear provisions of the Circular itself.[19] "If Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974).

b. Petitioners' second argument is that employees and unions should be deemed to have standing to contest cost comparisons under the Circular because, in petitioners' words, "[t]here are no advocates in the process other than

[18] Section 2467 was enacted in September 1988. Petitioners' opening brief in the court of appeals does not cite it at all. Their reply brief refers to it once in passing (Pet. C.A. Reply Br. 7; see also *id.* at 2).

[19] If petitioners' contentions concerning the meaning of Section 2467(b) were correct, Congress would not only have intended to modify the terms of Circular A-76 simply by making a reference to the Circular, but also to overrule the consistent line of judicial decisions holding that cost comparisons under Circular A-76 are unreviewable (see note 15, *supra*) and that, as the court of appeals held in this case, federal employees have no standing to challenge such cost comparisons (see note 21, *infra*).

the federal employees who have an interest in ensuring compliance with the regulatory procedures that prohibit an underestimate of contractor costs." Pet. 23. This is essentially the position adopted by Judge Mikva in his dissent below. Whatever force this argument might have in another context, it has no force in the context of OMB Circular A-76. Indeed, the argument is fully countered by the district court's correct determination that decisions made pursuant to the Circular are not subject to judicial review.[20]

Circular A-76 constitutes intra-Executive Branch policy. See, *e.g.*, S. Rep. No. 144, 96th Cong., 1st Sess. 4 (1979) (referring to Circular A-76 as "executive branch policy"). And as Judge Mikva's dissent itself recognizes, "[t]he zone of interest inquiry is at base an inquiry into Congress' intent." Pet. App. 47. Neither the Budget and Accounting Act of 1921 nor the OFPPAA can reasonably be construed to enable government employees and their unions to pursue judicial review of a Presidential management directive.

---

[20] Petitioners are mistaken in characterizing (Pet. 15, 17) the decision of the court of appeals as anomalous in light of the decision of the same court of appeals in *CC Distributors*, *supra*. Contrary to petitioners' suggestion (Pet. 15), *CC Distributors* does not hold that contractors have standing to challenge an A-76 cost comparison. Indeed, the alleged impropriety in the Air Force's conversion decision in *CC Distributors* was precisely that no cost comparison at all had been conducted. The court of appeals held that the contractors had standing (under Section 1223) to contest the Air Force's decision to convert to in-house performance without conducting a cost comparison. This holding does not conflict with the court's decision here that petitioners did not have standing to challenge the substance of the cost comparison that was admittedly conducted in this case. In any event, even if the D.C. Circuit's decision in this case and its decision in *CC Distributors* were in some tension, review by this Court would not be warranted merely to resolve an intra-circuit difficulty.

c. Petitioners' third argument is that the court of appeals erred in concluding that government employees and their unions lack standing to argue that the DoD's cost figures are not "realistic and fair" within the meaning of Section 1223 of the National Defense Authorization Act for Fiscal Year 1987. Pet. 23-24. The court of appeals' determination on this issue is correct.

As the court explained, the "realistic and fair" provision was enacted in order to overcome a perceived bias against private contractors in the cost comparison process. Pet. App. 30-31. The Senate Report refers to the clause as a "mandatory contracting out provision," and states that "realistic and fair cost comparisons" are required in order to eliminate various "handicaps" that impede contractors from bidding on an equal footing against in-house performance. S. Rep. No. 331, 99th Cong., 2d Sess. 277-278 (1986). According to the Senate Report, "[a]gency cost comparisons must be made more equal" because "DoD handicaps contractors' bidding on services and supplies during cost comparisons against retaining these functions in-house." *Id.* at 278. In light of this history, the court of appeals correctly held that unions' interest in retaining in-house performance does not fall within the zone of interests to be protected by Section 1223. That holding, like the court's holding regarding the Budget and Accounting Act 1921 and the OFPPAA, is not in conflict with the holding of any other court.

d. Petitioners' fourth and final argument (Pet. 24-25) is that the decision of the court of appeals contravenes four decisions of this Court: (1) *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970); (2) *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970); (3) *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971); and (4) *Clarke* v. *Securities Industry Association*, 479 U.S. 388 (1987). This argument too is without merit.

In each of these four cases, the Court held that the plaintiffs had standing to challenge a determination by the Comptroller of the Currency allowing banks to engage in certain non-banking activities. In *Data Processing*, the Court held that companies in the business of selling data processing services had standing to challenge a ruling by the Comptroller of the Currency that national banks, as an incident to their banking services, could provide data processing services to their customers. Similarly, in *Arnold Tours*, the Court indicated that travel agencies would have standing to contest a determination by the Comptroller allowing banks to provide travel services. In *Investment Company Institute*, the Court held that investment companies had standing to seek judicial review of a decision by the Comptroller of the Currency authorizing banks to operate collective investment funds. And in *Clarke*, the Court held that a trade association representing securities brokers had standing to bring suit alleging that the Comptroller of the Currency exceeded his authority in approving the applications of two national banks to establish discount brokerage subsidiaries. These decisions reflect a determination by this Court that, in enacting the statutory framework governing the banking industry, Congress may well have been concerned at least in part with protecting non-bank businesses from competition by national banks. See, *e.g.*, *Clarke*, 479 U.S. at 397.

The decision of the court of appeals in the present case obviously is not in conflict with the specific holding of any of the four cases. Nor does the court of appeals' decision contradict the more general principles of standing embodied in those cases. Indeed, the court of appeals specifically cited *Clarke* as "the most recent and leading Supreme Court statement on the zone of interest test" (Pet. App. 9), and the court rendered its decision "[o]bedient to the teachings of *Clarke*." *Id.* at 31. The court simply held that

unlike the banking laws—which this Court has found at least implicitly to embody a congressional concern to protect non-bank businesses from unwarranted competition by banks—the assortment of statutes cited by petitioners are, if anything, inconsistent with the interest of federal employees in preventing the contracting out of certain functions. The court of appeals' application of the zone of interest test to the specific context at issue in this case is sound and does not conflict with the holding of any other court.[21] Accordingly, it does not warrant further review.[22]

---

[21] To the contrary, it is consistent with the decision of every other court to consider the question of standing. See, *e.g.*, *American Fed'n of Gov't Employees* v. *Dunn*, 561 F.2d 1310, 1315 (9th Cir. 1977); *National Maritime Union* v. *Commander, Military Sealift Command*, 632 F. Supp. 409, 416, 417 (D.D.C. 1986), aff'd on other grounds, 824 F.2d 1228 (D.C. Cir. 1987); *American Fed'n of Gov't Employees* v. *Stetson*, 86 Lab. Cas. (CCH) ¶ 33,819, at 48,851-48,852 (D.D.C. July 24, 1979); *American Fed'n of Gov't Employees* v. *Hoffman*, 427 F. Supp. 1048, 1083-1084 (N.D. Ala. 1976).

[22] In its recent decision in *Department of the Treasury, IRS* v. *FLRA*, 110 S. Ct. 1623 (1990), this Court reversed a decision of the D.C. Circuit that had effectively held, under the federal labor relations statute, that government employees and their unions are entitled to demand third-party arbitration of challenges to certain A-76 determinations. The case was remanded for consideration of certain questions, including the question whether Circular A-76 is an "applicable law" within the meaning of the management rights provision of that statute, 5 U.S.C. 7106(a)(2). The matter is now pending before the Federal Labor Relations Authority. Although 5 U.S.C. 7106(a)(2) is not involved in the present case, the issues in the two cases are not unrelated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
*Acting Solicitor General**
STUART M. GERSON
Assistant Attorney General
LEONARD SCHAITMAN
THOMAS M. BONDY
Attorneys

MAY 1990

* The Solicitor General is disqualified in this case.